No. 15671

United States Court of Appeals

For the Ninth Circuit

DANIEL A. BRETT,
Appellant,

vs.

MOORE-McCORMACK LINES, INC.,
Appellee.

BRIEF FOR APPELLANT.

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I.

JURISDICTION.

This is an appeal from a final judgment of the United States District Court for the Northern District of California, Southern Division. Notice of Appeal to this Honorable Court was timely filed. The case is a seaman's action for damages and wages on account of personal injuries under the Jones Act (Act of June 5, 1920, c. 250, Sec. 33, 41 Stat. 1007, 46 U.S.C. Sec. 688) and the general maritime law, the District Court having jurisdiction under both provisions of law. This Court has jurisdiction of this appeal pursuant to the Act of June 25, 1948 (c. 646, 62 Stat. 929, 28 U.S.C. Sec. 1291).

II.

QUESTIONS INVOLVED.

1. Whether the Court erred in making unfair and prejudicial comment to the jury?

2. Whether the Court erred in giving his instructions and in refusing to give the plaintiff's proposed instructions?

3. Whether the award of damages was so inadequate and inconsistent with the evidence that a miscarriage of justice was done?

III.

STATEMENT OF THE CASE.

The appellant, Daniel A. Brett, is an American merchant seaman of Filipino-Irish descent. He was injured aboard appellee Moore-McCormack Lines, Inc.'s passenger-freighter, the MORMACGULF at Port of Spain, Trinidad, on February 20, 1955. The vessel at the time was lying offshore, at anchor, having just sent its passengers ashore.

When a ship is anchored in the stream, as the MORMACGULF was, it is a rule of the sea that an appropriate signal must be displayed so as to warn other ships that it is at anchor. By these requirements, the signal varies according to whether it is daytime or nighttime. At night a white light is required and during the day, a black ball is required.

Appellant was on "watch" during the time when the white light was to be replaced by the black ball, i.e. at break of day. One of his duties while "on watch" was to see to it that this change was made. At night, the black ball is kept in the forepeak or forward part of the ship. During the appellant's watch the passengers were sent ashore. In addition to his regular duties he was ordered to assist the passengers. This caused a delay in the changing of the anchor signals. When appellant was finally able to attend to this, daybreak had already passed. By that time changing the signals became a matter of urgency. Appellant went into the forepeak to get the black ball. As he came out and was closing the door to the compartment, an exhaust ventilator cover, weighing approximately thirty-six pounds and attached to the wall at the exhaust outlet, came down on the head of the appellant causing him to suffer severe head and brain injuries.

Appellant was removed to shore at Port of Spain for treatment and was taken back aboard ship. The ship continued its voyage to its next port, Rio de Janeiro, Brazil. On this entire trip, appellant was totally bed-ridden suffering from constant headaches and projectile vomiting.

When the ship arrived at Rio de Janeiro, appellant was removed to Strangers Hospital for treatment. He stayed there for two weeks and his ship sailed without him upon notification that he could not rejoin the ship. Thereafter he was flown back to San Francisco, California, to the U. S. Public Health Service Hospital.

Appellant's injury was caused by the fact that the above mentioned ventilator exhaust cover was not properly secured and as a result swung upon its hinges from an up to a down position.

Appellant was off work for a period of more than two years at the time of the trial. He suffers from a permanent brain injury which has given rise to a petit mal form of epilepsy. He continues to have projectile vomiting, dizzy spells and constant headaches. As a result of medical findings his master's license and the other papers authorizing him to pursue his career at sea have been revoked by the U. S. Coast Guard. He claimed damages for loss of wages, both past and prospective, permanent disability, and pain and suffering, both physical and mental.

IV.

SUMMARY OF ARGUMENT.

1. The Court below committed error by conducting the entire proceedings in a prejudicial manner and in making grossly prejudicial comments to the jury during the course of his charging them. This aroused a passion and prejudice in the jury and very greatly affected their verdict.

2. Appellant contends that the trial Court erred in giving certain instructions, over appellant's objections, on "negligence and unseaworthiness" in an inadequate, ambiguous and erroneous manner; in giving instructions on "contributory and comparative negli-

gence" when there was absolutely no evidence to support such a finding; in giving instructions on "damages" which were inadequate, ambiguous and erroneous; and in failing to give appellant's instructions on these matters which were proper statements of the law.

3. The evidence required an adequate award for the appellant. It was unquestionably established that the ventilator exhaust cover was "improperly secured" and as a result fell and caused appellant's injury. This was negligence under the Jones Act and "unseaworthiness" under the general maritime law, the latter cause of action resulting in absolute liability upon the ship owner. The verdict was so grossly inadequate as to justify the award of a new trial.

V.

ARGUMENT.

1. THE COURT BELOW ERRED IN MAKING CERTAIN COMMENTS TO THE JURY WHICH WERE UNFAIR AND PREJUDICIAL AND WHICH MATERIALLY AFFECTED THE JURY'S VERDICT.

In his instructions to the jury the Court below charged as follows:

> "Now, the attorneys have written on the board $500,000.00 and $300,000.00. I wish to say to you that in the opinion of the court any such figures as that are *fantastically high and have no relationship to the evidence in this case.* Any verdict —I am not saying that you should not make a substantial award based—if you come to the conclusion that the plaintiff is entitled to recover—

but that must be based upon the evidence that you have in the case, and *any such sum as $500,000.00 or $300,000.00, in my opinion, is so far beyond the reach of the evidence in this case as to reach the field of the fantastic.''* (Reporter's Transcript, p. 829.) (Emphasis added.)

''Now, likewise, damages should not be awarded by way of punishment. You are not here to punish anyone; *nor are you here in any crusade to divide the wealth of the country.''* (R., p. 830.) (Emphasis added.)

These statements were objected to by appellant on pp. 844-847, Reporter's Transcript. That they were utterly unjustified by any evidentiary conception, see infra, pp. 8-10.

The import of these statements was that the figures asked for in the complaint were unreasonable figures and that the jury should not consider or return anything in the nature of $500,000.00 or $300,000.00.

This was clearly prejudicial and unfair to appellant's case. The effect was to arouse the jury. That such conduct violates the basic right of a litigant to a fair and impartial trial has long been recognized. In *Quercia v. United States,* 289 U.S. 466, at p. 470, Chief Justice Hughes' opinion reads as follows:

''This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial . . . His privilege of comment in order to give appropriate assistance to the jury is *too important* to be left without safeguards against abuses. *The influence of the trial judge on a jury 'is neces-*

> *sarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.'* This court has accordingly emphasized the duty of the trial judge to use great care that an expression upon the evidence 'should be so given as not to mislead, *and especially that it should not be one sided';''* (Emphasis added.)

See also: *Knapp v. Kinsey,* (CCA 6), 232 Fed. 2d 458 at p. 466. Petition for Writ of Certiorari denied 1 L.Ed. 2d 86; *Crowe v. Di Manno,* (CCA 1), 225 Fed. 2d 652, at p. 655; *Connelly v. U.S. District Ct.,* (CCA 9), 191 Fed. 2d 692 at p. 697; *Billeci v. U. S.,* (CCA DC), 184 Fed. 2d 394 at p. 403.

Furthermore, the Court stated in his instructions that the issue of liability of the defendant in this case is not an easy one for the jury to determine (R., p. 826). Hence, when the Court thus inferred lack of evidence together with the above discussed prejudicial statements, the jury was undoubtedly impressed with the notion that any award of damages should be kept down to a minimum.

Such an overstepping the bounds of his privilege to comment is not cured by a statement to the jury that the Court's opinion is advisory only and is not binding on the jury. That admonition is always necessary. At most, it can offset only brief and minor departures from strict judicial impartiality. *Quercia v. United States,* supra.

It is recognized that in a trial by jury in a Federal Court, the judge is not a mere moderator but is the

governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. In charging the jury, it is within his province to assist the jury at arriving at a just conclusion by explaining and commenting on the evidence. Appellant submits that in making these statements in the case at bar the Court in no wise related them to any of the facts in evidence other than making the general statement that the damages were not supported by the evidence. Instead of *assisting* the jury in *eliciting the truth* and *examining the facts,* the Court rendered a profoundly damaging opinion properly within the scope of advocacy and argument rather than judicial comment.

The judge may array the evidence and comment on it to the jury, but comments should be judicial comment *fairly explaining* to the jury the contentions of the parties with respect to the evidence, and not argument by the Court in support of those contentions. *Virginian Railway Company v. Armentrout,* (CCA 4), 166 Fed. 2d 400, 4 A.L.R. 2d 1064. Nor may the Court refer to a sum suggestive of a proper award of damages or place a limit on the verdict of the jury. *Dowel, Incorporated v. Jowers,* (CCA 5), 166 Fed. 2d 214. Writ of Certiorari denied 68 Sup. Ct. 1346; *Wood v. Morrow,* (CCA 5), 119 Fed. 2d 776. The damages claimed were not "fantastic" but were clearly supported by the evidence.

At the time of the injury the appellant was earning approximately $10,000 per year. He worked steadily and took very little time off. The accident occurred two years prior to the trial; he therefore had a wage

loss of at least $20,000. Appellant's position with the company was secure. He held a master's license and in not too long a period of time, he would have been master of a vessel. According to the testimony of the defendant's own witness, Capt. Sommers, such a position receives pay of $11,000 per year. The 1937 Standard Annuity Table shows that at this time the appellant has a life expectancy of 33 years. Under the evidence of the case the jury could have found, as reasonable men, that the plaintiff was permanently disabled. The work loss for the remaining period of his life would then amount to in excess of $330,000.00.

If we take only his life expectancy till age 65, the age until which time he would normally be expected to be employed, he would still have a wage loss, if permanently disabled, of $250,000. Coupled with his previous loss, he would have a total loss of $270,000 in wages alone.

This does not allow any award for pain and suffering, humiliation, embarrassment. These items would undoubtedly be considerable when a man is an epileptic and has these fits in public places. In addition this does not allow any award for the psychiatric care that will be necessary for the man, for the medicines which he must take until he dies, or any of the other intangible things which the jury could well weigh in awarding damages. If the jury did find that he was permanently disabled, they could well have found a verdict between the sums that were placed on the board—$300,000 and $500,000.

Assuming on the other hand that appellant will be capable of going back and working, he will still have his wage loss of $20,000 and will have a prospective loss. He cannot immediately jump into something else where he would be earning $10,000 to $11,000 a year. There will certainly have to be a period of rehabilitation when he will be earning considerably less. In all likelihood his future will consist of a job at about $100 per week, and, even if he does have a job at $100 a week, he will have a prospective wage loss of $5,000 per year for the 25 years, or a total of $125,000 attributable to loss of wages. This amount plus the $20,000 he has already lost would amount to $145,000. The general damages, again, for his pain and suffering, humiliation, psychiatric treatment, medicines, and all of the other things that will be necessary for this man, could reasonably have been found by the jury to be valued at between $150,000 and $250,000.

This should have been a case of admitted liability. The defendant offered $75,000 in settlement. Such a figure clearly manifests the belief on the part of the defendant that liability exists. It cannot reasonably be argued that such sum was offered in settlement in order to avoid the time and costs involved in litigation —it is inconceivable that the "time and cost" involved in litigation could be so highly valued.

If speculation as to whether the erroneous charge was in fact harmful might be properly entered upon, it would be difficult, if not impossible, to resist the

conclusion that the charge of the Court, that the damages claimed were "fantastically high" had the inevitable effect of producing a small verdict. But, when error of the magnitude of this one is in question, speculations of this kind are utterly irrelevant.

In *Connelly v. U. S. District Court,* (CCA 9), 191 Fed. 2d 692, at p. 697, this Court said:

> "It is not enough that the judge, despite his predetermination of essential facts, may put them aside and conduct a fair trial, but that there also shall be such an atmosphere about the proceeding that the public will have the 'assurance' of fairness and impartiality."

It is submitted that the entire proceeding lacked such an "atmosphere" of fairness and impartiality and that partiality and prejudice was manifested from the manner and nature of the judge's conduct of the trial as follows:

At page 118, Reporter's Transcript, in the course of the direct examination, of the plaintiff the Court refused to allow counsel to develop the fact that the plaintiff was suffering from hallucinations, a necessary element for the jury to consider in determination of the question of general damages.

At pages 208-209. During cross-examination of Dr. Victor J. Freeman, a Diplomate in psychiatry and head of the psychiatric unit of the U. S. Public Health Service Hospital in San Francisco, an independent doctor whom appellant called as a witness, the Court intervened and became argumentative with the wit-

ness, even after the witness had answered the Court's question.

At page 234. During cross-examination of plaintiff the Court interrogated witness in an apparent attempt to show that the witness acted unreasonably. The Court assumed a fact not in evidence by suggesting that plaintiff should have gotten something to stand on so as to open the vent cover (line 8) and became argumentative with the witness (line 11).

At page 274. During cross-examination of appellant's witness, Dr. Charles L. Yeager, an independent witness, whom appellant called, the Court interjected a suggestive question, the answer to which was clearly prejudicial in that it tended to minimize the gravity of plaintiff's injuries.

At page 293. During cross-examination of plaintiff's witness, Dr. Lester S. Margolis, also an independent witness, the Court again interjected two questions which suggested answers clearly prejudicial to the issue of damages of the plaintiff.

At pages 296-297. During cross-examination of Dr. Margolis, plaintiff objected to a line of inquiry on the grounds that no foundation had been laid by counsel to the effect that plaintiff's present injury was related to an old injury. The issue would tend to reduce the question of plaintiff's injury and damages as a result of the accident. Inasmuch as the question was not pleaded by the parties, this line of inquiry constituted surprise to the plaintiff and had a prejudicial effect upon the jury. Furthermore, this objectionable line of inquiry was again pursued by the defendant's counsel

at pp. 348-351 and pp. 370-372. Notwithstanding the effect of the questions and plaintiff's objections thereto, the Court failed to rule upon the objections.

Page 348, line 1. The Court stated, "I don't think you will get an answer from him anyhow," inferring that plaintiff's witness on cross-examination was being evasive and prejudicial. The record shows that there was no basis for such an opinion, and to have made it before the jury as it was, was to discredit an important expert witness on plaintiff's behalf.

Page 440. At the close of plaintiff's case, (in the absence of the jury) the Court told the counsel for both sides that he questions whether there is sufficient evidence of liability in the case. Yet, the facts show:

1. Uncontradicted evidence that the vent cover was improperly secured. This resulted from the negligence of someone for whom the shipping company was responsible, and rendered the ship unseaworthy as to this plaintiff. There was absolute liability upon the defendant.

2. That the plaintiff acted reasonably at all times with respect to any danger to himself and that he did not, in fact know, nor have reason to know that a condition, dangerous to himself, even existed, and was therefore free from contributory negligence.

3. As a direct and proximate result of the condition of the ship plaintiff was injured.

In the absence of prejudice against appellant's cause it is submitted that there was no basis for the observation by the Court that there is a question as to liability.

Pages 468-471. During direct examination of defendant's witness, various questions calling for speculation were asked by defendant's counsel. Upon various objections and motions to strike these answers, all the objections were overruled and the motions to strike denied.

At page 574, Reporter's Transcript. During direct examination of defendant's witness, Dr. Edmund J. Morrissey, counsel asked a leading question. This was promptly objected to by counsel for the plaintiff. However, not only was the objection overruled, but the Court himself prompted the witness to answer even before ruling on the objection. The question was clearly leading and therefore objectionable.

Page 575. The answer to the above leading question wasn't even responsive. Counsel for plaintiff moved that it be stricken on those grounds. Again, the Court ruled in favor of the defendant.

Page 630. Again (in the absence of the jury) the Court showed, despite the evidence of liability offered by the plaintiff, prejudice:

> "The Court. Just because this nice young man had a serious injury here is not an occasion for just coming into court with a wave of the hand and saying: this is what I want.
>
> Mr. Belli. We have never treated it that way.
>
> The Court. You have some problems."

Pages 660-661. The Court ruled that an admission against interest is admissible but not admissible as to proof of the fact therein asserted. This is an incorrect statement of the law. (Infra, pp. 33-34.)

Pages 662-663. During discussion of motion for directed verdict the Court engaged in speculation as to whether a statement, offered by plaintiff as proof of the matter asserted, is hearsay when the evidence, of itself, showed no basis for such an inference.

Page 668. The Court displayed prejudice (in the absence of the jury) on lines 9 and 10 by inferring that a recovery in this type of case depended more upon the attorney the plaintiff happened to choose than upon the merits of the case itself.

The Court below participated very actively in the trial from beginning to end. Throughout the transcript of the proceeding there were many questions of witnesses, comments on the evidence, and remarks by the Court. In view of the one-sidedness, these various interjections clearly show that the unfair conduct and lack of impartial atmosphere throughout the proceeding so seriously prejudiced the plaintiff in presenting his case to the jury that he was deprived of his right to a fair and impartial trial.

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2. THE COURT BELOW ERRED IN GIVING CERTAIN INSTRUCTIONS AND IN REFUSING OTHER INSTRUCTIONS REQUESTED BY APPELLANT.

A. The Court's instructions on the matter of "damages" were grossly inadequate, erroneous and prejudicial and materially affected the jury's verdict.

Over the objections asserted by the plaintiff (R., pages 842 to 844), the Court instructed the jury on the subject of "damages" as follows:

"And in general, you may take into account in determining—if you reach the point where you feel the plaintiff should recover—you may take into account the nature of the man's, the person's injury, the extent of the injury, whether it is a permanent or a temporary injury, any pain or suffering the man may have had, any pain he might be likely to undergo in the future; you may consider any loss of earning capacity in the past or any loss of earning capacity that would be, according to the evidence, likely to occur in the future; and from all of those factors, you will determine what sum will compensate for the injuries sustained."

"Now, damages must be reasonable. You are limited to what the evidence shows to be damage in making any award that you would choose to make in this case. You may take into account the period of life expectancy that the plaintiff might have in determining the amount of his disability; you may determine in connection with the extent of his disability his capacity to work, how much and to what extent he is disabled from performing any reasonable activities that he might reasonably be able to engage in." (R., pages 828-829.)

These general instructions covered very briefly and inadequately only the subject of compensatory damages for injuries the appellant sustained and damages resulting from loss of earning capacity. The Court failed to instruct the jury on the matters of special and general damages and the distinctions thereof and the important elements of damages upon which the appellant's case rested.

One of the major elements of damages which the plaintiff was shown to have sustained as a result of the injury was mental pain and suffering. By the uncontradicted testimony of an expert witness, Dr. Victor J. Freeman, a psychiatrist, we find that the injury and its consequences had an extremely adverse effect upon the plaintiff's emotional well being. This evidence was brought out both during the direct examination and the cross-examination of the witness.

The direct examination:

> "Q. Could you tell the ladies and gentlemen what is the real damage to him, if anything, psychiatrically speaking, that will be permanent?"
>
> "A. Well, as I said, in Mr. Brett's case, he has a type of personality where he is, if anything, over-conscientious, and this kind of personality in psychiatry we find to be the one most susceptible to a depressive reaction if there is any major loss in their life . . . In this case, there is no question in my own mind that Mr. Brett is reacting to this loss of his occupation, *which is more to him than mere earning power in just such a way.*" (R., page 194.) (Emphasis supplied.)

The cross-examination:

> "Court. What I think you are really trying to find out, if I may ask it in just plain language, is that if the so-called convulsive seizures that the plaintiff has get better, you are not going to worry about the psychiatric aspect, are you?"
>
> "Witness. With the one stipulation, if he is able to get back to sea; if he was still not able

> to get back to sea, regardless of the neurological disorder, he would still be disabled psychiatrically." (R., page 208.)

The fact is that the plaintiff, the defendant and even the Court brought out the fact of mental suffering, humiliation and worry. In addition, plaintiff's wife testified that he wasn't "the same man" and that he suffered emotionally as he in fact did. The record shows that the plaintiff has suffered and is likely to suffer in the future from humiliation and embarrassment by reason of becoming an object of curiosity and ridicule among his fellows. This is clearly manifested from the evidence and particularly in the manner of person which the plaintiff is. In *Risley v. Lenwell,* 129 Cal. App. 2d 608 at page 652, the Court held, as proper, instructions to the effect that,

> ". . . physical pain and mental suffering were proper elements for the jury to consider; that the term 'medical suffering' included anxiety, worry, mortification, embarrassment and humiliation; and that mental suffering occasioned by any future pain was also a proper element of damage."

It is submitted that for the Court to have completely omitted any mention of mental pain and suffering and to have given so general an instruction as was given, was prejudicial error. As against a mere general or abstract charge, a party is entitled to a specific instruction on his theory of a case, if there is evidence to support it and a proper request is made, *Montgomery v. Virginia State Lines* (CCA DC), 191

Fed. 2d 770. One of the essential elements of plaintiff's claim for damages, viz., mental pain and suffering, was not included within the charge. Plaintiff's Proposed Instruction No. 19 correctly covered this matter and should, therefore, have been given.

As a result of the failure to have given this requested instruction, combined with the giving of the one actually given, the jury did not take this element into consideration in their determination of the amount of damages. This, in turn, produced an inadequate award.

The Court failed to charge the jury that it may take into consideration any and all future hospital, doctors' and general medical expenses that plaintiff may incur both presently and in the future. Again, these were essential elements upon which the appellant sought his recovery.

There was evidence in the record which clearly supported the appellant's contention that his injury is of a permanent nature. He requires continuous medication in order to avoid the attacks and seizures. Medical testimony to the effect that no improvement is foreseen indicated that the man will require such medication for the rest of his life. In addition, there are the tests which will be needed in order to determine whether the plaintiff may require additional medical attention, and the incidental expenses for doctors, hospitals, technicians, etc.

The general charge neither encompassed these elements of recoverable damages nor even indicated them.

Again, the jury was at a loss in determining the amount of damages aside from "injuries" and "loss of earning capacity".

With reference to the Court's charge on loss of earning capacity, it is the general rule that in a personal injury action the Court should instruct the jury to take into consideration, in estimating the plaintiff's damages, his future inability to attend to his *usual business or to perform the kind of labor to which he was fitted.* (15 Am. Jur., Damages, Section 380, page 819.) Plaintiff requested that the correct instructions be given on this matter and himself proposed Instruction No. 19 which was correct and properly urged plaintiff's contention which was supported by evidence in the record. The Court refused to give these instructions and over the plaintiff's objection (R., page 842) instead charged the jury as follows:

> ". . . You may determine in connection with the extent of his disability his capacity to work, how much and to what extent he is disabled from performing any reasonable activity that he might reasonably be able to engage in." (R., page 829.)

This instruction was confusing and tended to mislead and confuse the jury. What was meant by "reasonable activity" in the context as used? Did the Court purport to mean that "reasonable activity" encompassed employment as a seaman? In such a case, plaintiff would be completely and absolutely disabled from employment and his damages from loss of earning capacity would be computed upon employment as a seaman. On the other hand, perhaps the Court meant

by "reasonable activity" to exclude all forms of employment whereby plaintiff could not work because of his disability. The inference in such case was that the plaintiff was not affected by the disability. From this it follows that the jury would erroneously conclude that as to certain jobs, the plaintiff had suffered no disability and therefore had sustained no loss of earning capacity since he is still able to work at something. This would be erroneous for it would deny to the plaintiff the recovery of damages for the loss of his lifetime career, and the difference in remuneration between what he would have received therefrom and that which he *might speculatively* receive from some job for which he has never been trained.

This instruction failed to point out that the detriment to be compensated for is the loss actually sustained by the plaintiff himself, and not that which would result to the average man from a similar injury. As a direct result, the jury did not consider the distinction between a man employed as a seaman becoming disabled and the average man employed in an "average" job becoming disabled. This was directly attributable to the Court's erroneous instructions and contributed to the inadequacy of the award.

The Court's charges on the matter of loss of earning capacity were further confused by the inadequate reference to life expectancy tables without a statement as to what was the life expectancy of such a man as the plaintiff. At pages 842 to 843, plaintiff objected to the Court's failure to charge that the life expect-

ancy of a man of Mr. Brett's age was 33 years. In his reply, the Court assigned as the reason therefor that there was "no evidence of that." The Court was erroneous in this. The correct rule is as stated in *Forerster v. Dereito,* 75 Cal. App. 2d 323, at page 333, that, "Without actual proof thereof courts take judicial notice of mortality tables." See also *Risley v. Lenwell,* supra, at page 651; 31 C.J.S., Evidence, Section 99, pages 698 to 699.

The Plaintiff's Proposed Instruction No. 22 properly covered this matter. The plaintiff requested that it be given and objected when it was not. This failure to indicate the plaintiff's life expectancy as an element of damages, other than the broad and general statements made by the Court, left the jury without an important guide in their determination of an adequate award. It was therefore an error which materially affected their verdict.

B. Court below erred in charging the jury on the matter of contributory negligence; refusing to give plaintiff's proposed instructions that there was no evidence to support a finding of contributory negligence; failing to charge that the defendant had the burden of proof to prove by a preponderance of evidence any special defenses he had alleged.

The instructions on this matter were as follows:

> "If from the evidence you are satisfied that the act and conduct of the plaintiff at the time and place that was described as the time and place of the accident in this case was the sole cause of his own injury then he is not entitled to recover." (R., pp. 825-826.)

"Now, if you decide that the plaintiff himself was wholly at fault in the matter, then you don't have to proceed any further in the case, you have decided it. You would then give a verdict for the defendant." (R., p. 827.)

". . . if you should also find that the plaintiff himself was negligent also along—and that his negligence along with either negligence on the part of the ship or unseaworthiness of the ship brought about his injury, in that event, after you have ascertained and determined the total amount of the plaintiff's damage, if you decide that he is entitled to damages, then you will apportion the damages in the proportion that the negligence, if any, of the plaintiff himself bears to the total negligence.

"That is what is known as the doctrine of comparative negligence in the Federal law. You may take that into account in the manner in which you work out damages, if you find that there was any negligence on the part of the plaintiff himself which concurred with the negligence or unseaworthiness on the part of the ship and proximately contributed to his injury." (R., pp. 851-852.)

Appellant's exceptions to these instructions are noted at R., pp. 835-836, 853-854, 863.

While comparative negligence is applicable as against the cause of action founded in negligence, it has no application to an action founded on the doctrine of unseaworthiness. The latter doctrine creates ABSOLUTE LIABILITY. Therefore, there were *no*

defenses available whether to bar this cause of action or to mitigate the recovery of damages.

In any event, however, there was absolutely no evidence whatsoever of contributory negligence or comparative negligence, and therefore the Court committed great error by—

a. charging the jury on the matter of contributory negligence;

b. giving these instructions repetitiously so as to place undue emphasis upon the charge;

c. refusing to give plaintiff's requested instructions that the defendant had the burden of proof as to any and all special defenses; and

d. refusing to give plaintiff's instructions that the defendant had not met such burden of proof as to any special defense and that therefore the jury should disregard any consideration of the defense of contributory negligence.

The scintilla rule does not apply in the Federal Courts. *DeZon v. American President Lines* (CCA 9), 129 Fed. 2d 404, certiorari denied 63 S. Ct. 160, affirmed 63 S. Ct. 814, rehearing denied 63 S. Ct. 1025. A litigant who alleges an affirmative defense has the burden of proving such defense by a preponderance of the evidence. The "evidence" must be substantial and not a mere "scintilla." In the case at bar the defendant not only failed to sustain his burden of proof as measured by the "substantial evidence rule," but even failed as determined by the "scintilla rule"—i.e., not even a flickering spark of evidence.

Authorities define "contributory negligence" as being "conduct on the part of the plaintiff, contributing as a legal cause to his damage, which falls below the standard to which he is required to conform *for his own protection.* In general, it resembles negligence and is determined by much the same tests as the negligence of the defendant, *except that the element of duty to another does not enter.*" Torts, Prosser, Hornbook Series, Sec. 51, p. 283; Restatement of Torts, Sec. 463.

This is the important distinction between negligence and contributory negligence—in the latter the plaintiff must have reacted unreasonably with respect to a risk of harm *to himself.*

When the plaintiff went into the forepeak, and saw the vent cover closed, he had no more reason to believe or suspect its dangerous condition, that of being improperly secured, than he would have had reason to believe the ship's smokestack was improperly secured and would fall upon him. There was no foreseeable danger and therefore the plaintiff did not react unreasonably with respect to a risk of harm to himself.

The defendant alleged contributory negligence, and yet the evidence established only the following:

1. The cover is normally open.
2. On this occasion it was closed.

Plaintiff was entitled to the presumption that others had acted reasonably in closing and securing the cover and that therefore it was properly secured and offered no dangerous condition as to himself.

3. When closed, only two dangers could possibly have been risked:

a. the motor might have become defective if sufficient pressure was built up;

b. there might have been improper ventilation to the cargo.

However, at the time in question, the hatch to the cargo hold, being serviced by the ventilation system, was open, and therefore the fact that the system was running had absolutely no effect whatever upon the cargo.

4. By the testimony of several of the defendant's own witnesses (R., pp. 474-476, 503-504), if the vent cover was properly secured there was no danger that the pressure of the motors could force the vent cover off.

5. As a result of his assisting in the dispatching of passengers to the launch to be taken ashore and the performance of his other various duties, plaintiff was not able to change the anchor signals at daybreak. This caused the ship to be in a perilous situation, not only with respect to itself, but also to any other ships navigating the stream where the MORMACGULF was at anchor. Changing the anchor signal at that time became not merely a matter of primary importance, but rather a matter of emergency.

The defendant contends that the plaintiff should first have either opened the cover to the ventilator exhaust or have turned off the ventilation system altogether. In order for the plaintiff to have opened

the ventilator cover he would have had to have gone to the midship section and have gotten something to stand on so as to have enabled him to reach the securing mechanisms at the top of the cover. In order for the plaintiff to have turned the ventilation system off altogether, he would have had to have gone to the bridge where the control switch for the system was located. *There was no control switch at the forepeak part of the ship which would have turned the motors off.* Had the plaintiff pursued either of these courses which the defendant now suggests, there would have been an undue risk of collision with another ship, in which case the ventilation system would have become a matter of small importance.

This was the evidence upon which the defendant sought to prove that the plaintiff acted without due regard for his own safety and well being. However, this very same evidence clearly manifests that such an allegation of contributory negligence was, of itself, nothing more than an attempt to confuse the jury and to induce them to render an ineffective and inadequate award for the plaintiff upon a case which should have been admitted liability. (The defendant having offered to settle before the trial for $75,000.00.)

The plaintiff did not act unreasonably with regards to protecting himself against undue risk of harm when he sought first to change the anchor signal and thereafter shut off the ventilation system. Quite the contrary, had he first attended to the relatively small matter of the vent cover, rather than changing of the

warning signals, then his election and conduct would have been very unreasonable both as regarding the safety of the ship and its crew as well as himself. Upon these facts reasonable men could draw no different conclusion. In *Hamden Lodge No. 517, I.O.O.F. v. Ohio Fuel Gas Co.,* 127 Ohio St. 469, the Court held:

> "If reasonable minds may draw different inferences, or reach different conclusions, a jury question is presented. But, if reasonable minds can reach only one conclusion, the jury should not be allowed to speculate upon the matter. To do so is to allow them the opportunity of returning a wholly unreasonable verdict."

It is error to give instructions upon allegations in the pleadings which are not supported by proofs at the trial. Furthermore, where there is no evidence tending to prove a particular fact, the Court is bound to so instruct the jury when requested. *Greenleaf v. Birth,* 34 U.S. 292 at p. 299. The appellant requested the Court to instruct the jury to disregard the allegations of contributory negligence (see instruction No. 7), which was a correct and proper charge and therefore should have been given. This was refused. This constituted error of particular materiality in view of the above mentioned erroneous instructions on the matter of contributory negligence.

Further error was committed by the Court in failing, over plaintiff's requests and objections, to charge that the burden of proving special defenses was upon the defendant. Had such a charge been so given, the jury could have determined that there was

no evidence of contributory negligence and would have so found. Without the charge the jury was not restricted to the limitations of "preponderance of evidence", but was free to find contributory negligence even upon the pleadings, alone.

Inasmuch as there were instructions on contributory negligence where there was no evidence thereof, there was undue emphasis placed upon this matter, and there were no instructions as to burden of proof as to the matter of contributory negligence, there was gross error, which, combined with the other errors herein assigned, caused the jury to bring in an extremely inadequate award of damages.

C. The Court's instructions on negligence and the doctrine of "unseaworthiness" were inadequate, ambiguous, and erroneous and clearly affected the jury's verdict.

The instructions given by the Court on this subject were as follows:

> "Now, the owner of the ship has a duty to maintain and provide gear and appliances and appurtenances of a safe and suitable character, suitable and safe for the purposes for which those particular pieces of equipment or gear or appurtenances are designed and intended to be used. In order to determine whether the plaintiff has sustained by a preponderance of the evidence his claim that the cover of the air outlet in this case to which reference has been made was seaworthy, you should consider all of the circumstances as time, place, and persons involved. That is, you should consider the purpose of the cover, its location and its condition, as you find it to be the

case from the evidence that has been presented to you at the time of the alleged accident, and if it appears to you by a preponderance of the evidence that the cover was in fact unseaworthy, according to the definition that I have given you, and that that was the proximate cause of the injury, then there would be liability upon the part of the defendant." (R., p. ~~841~~ 824)

Appellant objected to this instruction (R., p. 834) and requested the Court to give, in detail, a more full definition of the elements of a cause of action based upon unseaworthiness. Plaintiff's proposed instruction No. 12 covered briefly and correctly the elements of the unseaworthiness cause of action, to wit:

1. The liability of the ship owner to the seamen for the injury resulting from unseaworthiness does not depend upon negligence.

2. The liability is absolute—exercise of due care does not relieve the owner of his duties to furnish adequate appliances.

3. This duty is absolutely non-delegable.

4. The duty is contractual in nature.—*Patterson v. Alaska S.S. Co.* (C.C.A. 9), 205 Fed. 2d 478; *Seas Shipping Co. v. Sieracki,* 328 U.S. 85.

Nowhere did the Court instruct the jury as to the above requested elements. Without an instruction encompassing these important and distinguishing elements, the cause of action founded upon unseaworthiness is not distinguishable from a cause of action founded upon negligence alone. In short, the Court

gave two instructions on negligence and none on the matter of unseaworthiness. The appellant was entitled to have a clear and distinct instruction on this latter cause of action. In the absence thereof he was unjustly required to bear a greater burden of proof and, in substance, had to show negligence or else fail to recover.

The Court further instructed as follows:

> "Now, if you decide that the plaintiff himself was clearly at fault in the matter, then you don't have to proceed any further in the case, you have decided it. You would then give a verdict for the defendant."
>
> "If you decide that the plaintiff has not shown by a preponderance of the evidence that the defendant was negligent and that that negligence was not the proximate cause of his injury, then also your work is finished and you don't have to go any further, you decide in favor of the defendant." (R., p. 827.)

Along these same lines this instruction further confused the jury as to any distinction between negligence and unseaworthiness and was in fact an erroneous statement. It is settled law that liability for unseaworthiness arises completely irrespective of any showing of negligence on the defendant's part—*Seas Shipping Company v. Sieracki, supra; Patterson v. Alaska S.S. Co., supra.* That such error materially affected the jury is obvious in view of the fact that the import of these instructions was that unless plaintiff prove negligence he cannot at any rate recover.

Not only did the Court place a greater burden of proof upon the appellant, but erroneously withdrew material evidence with which the appellant could have met such burden.

The instructions given by the Court on this subject were as follows:

> "We have a Federal statute, that the attorneys have referred to as the Jones Act, and that's the act by which seamen may sue the owner of a ship and can recover damages for any injury that he sustains if he can show that his injuries were due to some negligence on the part of the ship, *which means any fellow employee as well,* that either in providing him a safe place to work or in negligently not providing him with the proper tools and equipment or faulty tools and equipment. He has the burden of showing under the Jones Act, if he seeks a recovery under that act, he has the burden of showing that some negligence on the part of the ship or *other employees* was the proximate cause of his injury." (R., pp. 823-824.) (Emphasis added.)

> ". . . one or both of the lawyers, I am not certain which, made some reference to the fact that there are some stevedores involved and that the court would give instructions concerning this matter. I do not intend to give you any instructions on such subjects as stevedores because in my opinion, as far as I can see, *there is no evidence in this case as to who put this cover up,* and therefore, I am not going to give you any instructions on a subject on which there is no evidence before you." (R., pp. 827-828.) (Emphasis added.)

> "Now, ladies and gentlemen, the issue as to the liability of the defendant in this case is, I would say to you, is not an easy one for you to determine *because of the nature of the evidence in the case,* and you will have to use your best judgment and your common sense to decide the question. *You cannot engage in speculation or conjecture or surmise as to how the accident happened in this case.*" (R., p. 827.) (Emphasis added.)

Appellant objected to these instructions. (R., pp. 837-842.) Instructions are to tell the jury what issues are in the cases rather than to tell them what issues are not. *Consolidated Electric Coop. v. Panhandle E. Pipeline Co.* (C.C.A. 8), 189 Fed. 2d 777. In addition, appellant contends the Court should have charged the jury as requested by him that, "a vessel owner such as the defendant in this case is liable for the negligent act of a seaman *or longshoreman* causing injury to other seamen aboard the vessel," and that the Court should have instructed the jury to disregard the statement by the Court that there is "no evidence" as to who put the cover up.

The record shows that by the evidence in defendant's own Exhibit "A" the following statement was made by one of the defendant's own representatives in his written report to the underwriters:

> ". . . the cover plate had been raised from an open position and *improperly secured* with wing bolts, *apparently by one of the stevedores.*" (Emphasis added.)

Appellant submits that this is not only admissible into evidence as a prior inconsistent statement but also ad-

missible as an admission and as evidence of the truth of the matter asserted (McCormick, Evidence, Hornbook Series, pp. 502-503) and therefore was entitled to an instruction on the law encompassing that fact among the others.

The Court assigned as his reason for charging as he did and for refusing to charge as requested by plaintiff, that this statement seemed to be based upon opinion rather than first hand knowledge. He emphasized that the use of the word "apparently" indicated this. (R., p. 838.) The Court was in error in his action and in the reasoning therefor.

The fact that the admission was opinion or based upon hearsay does not of itself render the admission inadmissible, either as such, or for the purpose of proving the truth of the matter contained therein. It is submitted that when a man speaks against his own interests it is supposed to be that he has made an adequate investigation. (McCormick, p. 507.) In the case at bar, the statement was made in a report of the accident to the underwriters of the defendant ship company. It seems inconceivable that such reports would be made unless and until a most thorough examination and investigation had first been made. Here on the basis of his investigation, the conclusion was that the cover was improperly secured "apparently by one of the stevedores."

Furthermore, the use of the term "apparently" does not of itself render this statement nugatory. According to Webster's New Collegiate Dictionary, "apparently"

is defined as "having such an appearance of reality as to appear reasonably true under the circumstances." Upon his investigation of the "circumstances" the defendant's representative stated as being "reasonably true" that the vent cover was improperly secured by one of the stevedores.

In *Kulukundes v. Strand* (C.C.A. 9), 202 Fed. 2d 708, this Court impliedly approved the use of this term in order to reach a similar finding, viz., that the stevedores had been negligent. There we had a case where a longshoreman was injured when he fell into the ship's hold, allegedly as a result of defects of strongbacks and flanges, which rendered the proper securing of the hatch covers very difficult. While the claimant was carrying on his work, one of the hatch covers, on which he stood, gave way precipitating him into the hold. Some question arose as to who had left the hatch cover so improperly secured. This Court said at pp. 710-711:

> "The exact manner in which the hatch cover on which Strand was standing slipped out of place, precipitating him into the hold below, is not entirely clear from the record . . . Strand denied personally having placed the hatch cover on which he was standing, and appellant (vessel owner) introduced no contrary evidence. *The hatch cover was therefore apparently placed by one of the other longshoremen.* This was not such a superseding cause as would bar appellant's liability." (Emphasis added.)

In the case at bar, the appellee not only failed to introduce any evidence which would show that the

cover was not put up by stevedores, but himself introduced said "reports of the accident" as his own exhibit. Let him not now be heard to impeach his own evidence.

The fact that the statement was based on an opinion would go only to its credibility (*Pekelis v. Transcontinental and Western Air* (C.C.A. 2), 187 Fed. 2d 123 at p. 129), and, of course, credibility of evidence is properly within the province of the jury, not the Court.

The clear import of these instructions was not only to withdraw from the jury actual material evidence upon which the plaintiff's case was based but also to induce the jury to believe that such evidence was "speculation, conjecture, or surmise." Had the Court given the plaintiff's requested instructions on the matter of defining and explaining "inferences and presumptions," the jury, despite the judge's remarks, would have found evidence to more strongly support the plaintiff's case and, commensurate therewith, would have rendered a more adequate award. It was therefore prejudicial error for the Court to, not only have failed to instruct the jury as requested by the plaintiff, but to have told them that "there was no evidence" on stevedores.

3. THE AWARD OF DAMAGES WAS GROSSLY INADEQUATE AND WAS CLEARLY AGAINST THE WEIGHT OF THE EVIDENCE. (Supra pp. 8-10.)

Completely aside from the elements of physical and mental suffering, and from extensive medical care and treatment, and assuming that the jury contemplated only loss of earning capacity when they awarded a $44,000 verdict, the verdict is nevertheless grossly unjust and utterly irreconcilable with the facts, to wit:

Plaintiff earned about $10,000 per year. As a result of the injury, he was out of work two years until the time of the trial and was therefore unquestionably entitled to $20,000 for past loss of earnings. This leaves $24,000 to account for his future loss of earning capacity.

By the 1937 Standard Annuity Table, the plaintiff has a life expectancy of about thirty-three years. But, even assuming that, we will look only to his so-called productive or useful years, i.e. to the traditional retirement age, sixty-five. The plaintiff, therefore, has twenty-five years in which he would normally be expected to be gainfully employed.

Now then, if we take this figure of $24,000 to account for his future loss of earning capacity, it means that despite his injury, and despite his being termed an "epileptic," and despite the fact that the man is forty years of age, inexperienced and unfamiliar with any other line of work, the jury nonetheless felt that the income the plaintiff will earn will only be reduced by less than $1,000 annually, i.e., that by reason of the injury and its full consequences, plaintiff will

suffer only a loss in earning capacity of less than $1,000 per year. By inference then, the jury felt that the plaintiff will start right out on another job and immediately begin earning in excess of $9,000 per year. Such an absurdity!

Following this, then, just how much by way of damages is left to compensate the plaintiff for his past, present and future sufferings? Is it the belief of the jury that the physical pain and discomforture involved in projectile vomiting, constant headaches, dizzy spells and the like which the plaintiff suffers are, at best, nominal? Is the label "epileptic" and all the cruel incidents attached thereto, valueless? Surely not! In what way, then, are the plaintiff's suffering, both physical and mental, and his medical expenses to be compensated? Despite the overwhelming evidence, the jury felt there was to be no compensation. This was the direct result of a passion and prejudice instilled in them by the prejudicial comments of the Court. The verdict was so inadequate as to indicate that the jury, in no wise, let the evidence guide them to their award.

VI.

CONCLUSION.

As a result of his injury, the plaintiff can no longer work as a seaman. He made the sea his career. Commensurate with his extremely able and willing work, he received an adequate salary, approximately $10,000 per year. According to uncontradicted testimony pro-

duced by both sides, the plaintiff's salary was more than well earned. In the light of his past education and experience, it was nothing less than a foregone conclusion that the appellant would one day have become the master of his own ship . . . an ambition he undoubtedly entertained during all his years. With the captainship would, of course, be the increase in pay. Today, such ambitions are allowed to dwell only in the hearts of others. Only the plaintiff's former companions and mates may hopefully and expectedly look forward to this goal. To Daniel Brett there is left only the consolation that some day he, too, *might have been* master . . . a consolation filled only with the bitter knowledge that "someday" will never come.

Of humanity it is said, "A man does not live by bread alone." What, however, shall be said of Daniel Brett? Dr. Lester H. Margolis, Diplomate in neurology and is consultant neurologist at the U.S. Public Health Service Hospital in San Francisco:

> "He suffers from a form of post-traumatic epilepsy." (R., p. 282.)
>
> "Once the diagnosis of epilepsy appears substantiated and once anticonvulant or antiepileptic medication is found to be necessary or indicated, *then he is not classifiable as fit for duty at sea.*" (R., p. 289.) (Emphasis added.)
>
> ". . . the diagnosis of epilepsy must be made, as has been stated, that I feel the patient does and has to be called an epileptic." (R., p. 290.)

Dr. Victor J. Freeman, a Diplomate in psychiatry and head of the psychiatric unit of the U.S. Public Health Hospital in San Francisco:

"*Indefinitely* unfit for sea duty." (R., p. 182.) (Emphasis added.)

Dr. Charles L. Yeager, Diplomate in psychiatry, neurology, and electroencephalography, does not expect the appellant's condition to improve, but to become worse. (R., pp. 262, 277.) These men are experts. They are independent and were called upon by the plaintiff only after they had made their diagnosis. Upon the basis of these reports and their recommendation, the U.S. Coast Guard has revoked appellant's master's license and other papers.

Even the defendant's doctor, Edmund J. Morrissey, felt that the appellant may be subject to convulsive seizures and would not be able to return to work for at least four or five years, *assuming he had no such seizure.* (R., p. 574.)

The appellant's career at sea has come to an abrupt end. There is neither the hope nor the expectancy which an achievement filled future holds. Instead there is the fear and uncertainty which a forty-year old family man must face when thrown upon an unfamiliar and competitively cold employment market in search of a job, a job which is to last for the rest of his useful life.

There will not be the comforting security of a job well done, nor even a job which he knows he can do. There is only the frustrating dilemma of trying to find a job for the mere sake of earning a living, and of being turned down for the fear that he may some day have a convulsive seizure and injure someone.

Trial by jury has evolved through history as the most effective and fair means of securing justice.

Twelve jurors are selected so as to avoid the possible prejudices and passions which any one man might have. It is felt that if any one juror might have such partial leanings, that they would become negatived by the reason and thoughtfulness of his colleagues, the other jurors.

The trial judge, however, sits not with the jury, but above them. To the jury, the trial judge often represents justice personified. Here, they reason, is a man who must be the most well versed person on the law in the entire courtroom. More so than the attorneys. Surely, who else but the judge hears so much litigation—upon this premise who else but the judge is more qualified to render an opinion.

These thoughts are founded in valid reason. The effect and impact of the trial judge is surely great. If his "*slightest* intimation may prove controlling"—then a statement that the damages were "fantastic" surely did prove devastating.

This case is novel. There were two sets of lawyers for defendant, only one for appellant and no impartial judge.

The learned trial judge went overboard. His own prejudice and partiality completely permeated the courtroom and obviously, to libellant's reversible prejudice, even the jury room.

The award of damages was extremely inadequate. The argument that the jury may have found contributory negligence and thereby reduced the plain-

tiff's recovery is destitute of merit. There was no contributory negligence and in view of the Court's erroneous and misleading instructions, prejudicial comments, and prejudicial conduct throughout the entire trial, it is virtually impossible to determine upon what basis the jury did, in fact, determine their award.

At the present time, the plaintiff has not had his day in court. This miscarriage of justice, we respectfully submit, can only be remedied by the awarding of a new trial.

Dated, San Francisco, California,
16 August, 1957.

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